

VZCZCXRO6172
PP RUEHBZ RUEH DU RUEHMR RUEHPA RUEHRN RUEHTRO
DE RUEHSA #2141/01 2941625
ZNY CCCCC ZZH
P 211625Z OCT 09
FM AMEMBASSY PRETORIA
TO RUEHC/SECSTATE WASHDC PRIORITY 9922
INFO RUEHZO/AFRICAN UNION COLLECTIVE
RUCNSAD/SOUTHERN AF DEVELOPMENT COMMUNITY COLLECTIVE
RUEHTN/AMCONSUL CAPE TOWN 7246
RUEH DU/AMCONSUL DURBAN 1325
RUEHJO/AMCONSUL JOHANNESBURG 9607
RHEFDIA/DIA WASHINGTON DC
RHEHNSC/NSC WASHDC
RUEAIIA/CIA WASHINGTON DC

C O N F I D E N T I A L SECTION 01 OF 03 PRETORIA 002141

SIPDIS

E.O. 12958: DECL: 10/23/2019
TAGS: [PGOV](#) [PREL](#) [PHUM](#) [KDEM](#) [PINR](#) [SF](#)
SUBJECT: COURT SELECTIONS SHOW HOW CONCERNS ABOUT JUDICIAL
INDEPENDENCE ARE HYPED

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Classified By: Political Counselor Walter N.S. Pflaumer for reasons 1.4
(b) and (d).

Summary

11. (C) President Jacob Zuma finalized his appointment of five new justices to the Constitutional Court, the nation's highest legal body, on October 11. For most of the past year, and particularly during the election campaign period ahead of the national election in April, opposition leaders and some political pundits argued that judicial independence was threatened under a Zuma administration. Such fears were largely based on the argument that Zuma himself was involved in separate court bids involving rape and corruption and that he was a "victim of a political conspiracy" at the hands of some of the country's top justice administrators. Zuma's appointment of five new justices -- almost all with solid legal qualifications and records of upholding the Constitution -- was largely praised by the same critics and demonstrates his commitment to judicial independence. End Summary.

Zuma Finalizes Constitutional Court Picks

12. (C) After a selection process that began nearly one year ago, Zuma confirmed his appointments to the Constitutional Court on October 11. Zuma appointed Eastern Cape Judge Johan Froneman, Supreme Court of Appeal Judge Chris Jafta, Northwest Judge Mogoeng wa Mogoeng, and Johannesburg High Court Judge Sisi Khampepe. Zuma named Sandile Ngcobo as Constitutional Court Chief Justice. The South African leader made his selections following the Judicial Services Commission's deliberations and recommendations. With the exception of Mogoeng, all of the selections matched the names the Commission submitted on the shortlist to the President. (Note: The process for selecting justices involves months of interviews and internal debate by the Judicial Services Commission. The Commission then opens the process up for public comment and scrutiny before finalizing a shortlist of preferred candidates and submitting those names to the Presidency. The President can either confirm the Commission's list or add names from the pool of justices the Commission might have placed lower on its own list. End Note.)

13. (C) Each of the new justices brings a wealth of legal experience. Below are brief biographies for each of the new justices:

-- Chief Justice Sandile Ngcobo was born in Durban in 1953 and graduated with law degrees from the University of Zululand in 1975. He was held in detention from 1976 to 1977. He went to work in the Maphumulo Magistrate's Office upon his release. In 1978, he joined KK Mthiyane and Company, a law firm in Durban. As an articled clerk and then an associated attorney, he performed general law office work such as registering corporations, advising corporate directors, and administering private property estates. In 1982, he moved to the Legal Resources Center in Durban where, as an attorney at law, he tried public-interest civil and criminal cases involving the ejection of tenants from townships, the forced removal of black communities to homelands, and police torture. From 1986 to 1987, he served as a law clerk and research assistant to A. Leon Higginbotham, former Chief Judge of the U.S. Court of Appeals for the Third Circuit. During this time, he also taught seminars at Harvard University and Stanford University. He returned to South Africa in 1988 to become Acting Director of the Legal Aid Services Clinic at the University of Natal and to practice privately. From 1992, he practiced as an advocate in Durban, focusing on labor and employment law, constitutional law, and general practice. He was appointed in 1999 to the position of acting Judge President of the Labor Court and Labor Appeal Courts.

-- Johan Froneman was born in the Eastern Cape in 1953 and is widely regarded as a judicial activist whose passion for the Constitution is "etched in the lines of his judgments, lectures, and public statements." Prominent legal scholar

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Pierre de Vos believes that Froneman "has written some excellent and innovative judgments to try and address the systemic problems with the administration of public grants in Eastern Cape." He has told reporters that he views the Constitution as the "Never Again" document designed to ensure the atrocities of apartheid are never repeated. He has argued that the Constitution is a "pro-poor document" that provides for socio-economic rights such as access to water, health, and education. In 2000, he ruled to allow four persons with disabilities to bring a class action lawsuit on behalf of thousands of other persons with disabilities whose grants had been cut by the Eastern Cape government. His judgment paved the way for thousands of disabled individuals to secure justice and access to their grants without legal representation. Described as reserved and softly spoken, Froneman teaches as an adjunct professor at the University of Stellenbosch.

-- Chris Jafta has long been on the Constitutional Court's list of acting justices. He earned his law degrees at the University of Transkei in 1988 and steadily worked his way up in the legal field after graduation. From 1993 to 1999, he practiced law in the Eastern Cape. He was appointed as the Judge of the Transkei High Court in 1999. In 2001, he was an acting Judge President for the Supreme Court of Appeal before serving from 2003 to 2004 as an acting Judge in the Labor Appeal Court. From 2004 until his present appointment, Jafta served as a Judge in the Supreme Court of Appeal.

-- Mogoeng wa Mogoeng was considered a surprise choice by Zuma and has the weakest background of the new justices. Mogoeng was a prosecutor from 1986 to 1990 before practicing law privately in Northwest and Gauteng. He served as Deputy Chairman of the Mafikeng Society of Advocates from 1993 to 1997 and served on the boards of several parastatals and companies during this time period. He was appointed to the Labor Court of Appeal in 2000 and in 2002 was named Judge President of the Mafikeng High Court. De Vos thinks Mogoeng "interviewed very well and was very charismatic when he

appeared before the Judicial Services Commission." De Vos added that he performed in the tradition of a "lay preacher or a gospel singer." During the interview, Mogoeng reportedly stated that he has very little constitutional law experience or knowledge.

-- Sisi Khampepe was the only woman selected by Zuma to serve on the court. During her interview with the Commission, Khampepe said, "Women in our society comprise a majority (of the population) ... Women bring their own perspective in the adjudication of issues. They don't only bring knowledge, but bring in their own reasoning with it. There are issues that men would not take as seriously as women would." Khampepe earned her Bachelors degree from the University of Zululand and a Masters degree from Harvard University. From 1998 to 2002, she served as Deputy Director of Public Prosecutions. In 2002, she was named as Judge to the High Court of the Witwatersrand Division of Gauteng. She has held a number of positions and chairmanships in addition to her court appointment. Khampepe served as a member of the Public Service Commission, the Truth and Reconciliation Commission's QService Commission, the Truth and Reconciliation Commission's Amnesty Committee, the Electoral Appeal Tribunal, and as a candidate attorney for Bowman Gilfillan Attorneys. She also served as a chair for the National Council of correctional Services.

14. (C) Zuma faced immediate criticism for the shortage of female appointments. However, the government argued that the selections balance the need for strong judicial backgrounds on the nation's highest court with the need for diversity at lower courts. For instance, most legal scholars say Zuma's appointment of only one female judge reflects a government push to appoint more women as judge presidents -- where there are currently no female justices -- in courts below the Constitutional Court. De Vos has said that without strong justices as lower courts, the future of higher courts could be bleak and "without diversity." (Note: Legal advocate Peter Mothle affirmed to Poloffs in recent months that there is very little diversity in lower courts and the lack of female candidates is "shocking." End Note.) The Democratic Alliance also criticized Zuma for his selection of Mogoeng because Mogoeng had failed to recuse himself from a case heard in his court involving a family member.

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Comment

15. (C) Zuma's appointments end a lengthy process that many feared would turn out badly for the Constitutional Court and for South Africa. While the choices are not as stellar as those in the "Class of 1994" made by former President Nelson Mandela, each of the justices brings experience, diversity, and respect for judicial independence. The selection by Zuma of Ngcobo, Froneman, Jafta, Mogoeng, and Khampepe was transparent and, on the whole, followed the recommendations made by the legal experts on the Judicial Services Commission. Although the shortage of female representation to the nation's highest court is disappointing for this round of appointments, stronger women justices along with greater diversity at the lower levels of South Africa's judicial system bode well for the future. End comment.
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